(31,901)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 364

JOHN A. GROSFIELD AND RICHARD CAPLIS

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 4465

JOHN A. GROSFIELD and RICHARD CAPLIS, Appellants,

vs.

UNITED STATES, Appellee

Appeal from the District Court for the Eastern District of Michigan

Before Denison, Donahue, and Moorman, Circuit Judges

STATEMENT OF FACTS

Certificate

For the full understanding of the questions to be certified, we state the following facts:

Appellants own premises, in the business district of Detroit, consisting of a store building and in the rear a connected building suitable for garage and warehouse purposes. They rented the entire premises to Silverman for a wholesale grocery, and he used the rear building for storage. During this tenancy the prohibition officers found a still in operation on the second floor of the rear building. This proceeding was thereupon commenced by the filing of a bill against the tenant and the landlords, asking that the nuisance be abated. The landlords thereupon, and before this matter came on for hearing, ousted the tenant, and rented the rear building to a new tenant for legitimate purposes.

Upon the hearing of this matter the landlords offered to show that they had no participation in, nor knowledge of, the unlawful use by Silverman, and had no reason to be put upon notice that Silverman was permitting or causing any such unlawful use,—in other words, that they acted entirely in good faith in renting to him and had no reason to believe anything wrong until learning of the discovery of the still, and that they thereupon ousted their offending tenant.

The District Judge considered that this offered testimony was immaterial, refused to permit the testimony and en-
[fol. 2] tered an order that the rear building was a common nuisance as defined in Title 2 of the National Prohibition Act; that the nuisance be forever abated; "that said real estate shall not be occupied for any purpose for the period of one year from the date of this decree or until the further order of this court herein, commanding and directing that all persons be prohibited from entering in or upon said premises for the period of one year from the date of this decree, or until the further order of this court herein; and further commanding and directing that all persons be prohibited from taking away, moving or in any manner interfering with the contents of said premises." It was further ordered that the Marshal "close the said premises for use or occupancy for the period of one year."

It is contended by the United States that the order was justified under Section 22 of Title 2 of the National Prohibition Act; it is contended by appellants that since, under Section 21, the premises could not even be subjected to a lien for costs unless the landlords had knowledge or reason to believe that the building was being unlawfully used, Congress could not have intended to subject his property to the more complete forfeiture of Section 22, in the absence of such knowledge or reason to believe; and that, if Section 22 is to be considered as intending to give the power here exercised, the appellants' property is taken without due process of law.

Upon these facts we desire the instruction of the Supreme Court for our proper decision of the following questions of law arising therefrom:

Questions Certified

1. Is it the intent of Section 22, Title 2, to authorize a court of equity to close for a year "or until otherwise ordered by the court," premises from which the landlord has ousted the offending tenant, and this in a case where the landlord had terminated the lease promptly after he first knew or was chargeable with notice that the tenant

was using the premises for the manufacture or sale of intoxicating liquor?

2. If the first question is answered in the affirmative, then was such section in this particular a constitutional exercise of the legislative power?

Dated April 5, 1926.

A. C. Denison, Maurice H. Donahue, Chas. H. Moorman, Circuit Judges.

Filed Apr. 23, 1926. Arthur B. Mussman, Clerk.

[fol. 3] Certificate to foregoing omitted in printing.

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IN THE

Supreme Court of the United States

October Term, 1926

No. 364

JOHN A. GROSFIELD AND RICHARD CAPLIS

vs.

THE UNITED STATES OF AMERICA.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR APPELLANTS

STATEMENT

The Circuit Court of Appeals for the Sixth Circuit certifies the following questions concerning the construction and validity of the padlock provisions of the National Prohibition Act printed below[1]. The facts

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[1]Act October 28, 1919, c. 85, Title 11. No. 21, 22, 41 Stat. 314.

§21. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provisions of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure or place shall be subject to a lien for and may be sold to pay all fines

under which the questions are presented are concisely stated in the certificate and no advantage is seen in restating them here.

Briefly, in ordinary warehouse premises in the business district of Detroit, officers discovered a still in operation. The landlords upon being notified of that fact immediately ousted the tenant who was responsible therefor, and leased the premises for legitimate business. Landlords acted in the matter with all reasonable diligence. No evidence was presented that attached to the premises there existed any trade tending to facilitate the maintenance of a nuisance, or that the premises in any manner constituted a continuing nuisance.

QUESTIONS CERTIFIED

1. Is it the intent of Section 22, Title 2, to authorize a court of equity to close for a year "or until otherwise ordered by the court," premises from which the landlord has ousted the offending tenant, and this in a case where the landlord had terminated the lease promptly after he first knew or was chargeable with notice that the tenant was using the premises for the manufacture or sale of intoxicating liquor?

2. If the first question is answered in the affirmative, then was such section in this particular a constitutional exercise of the legislative power?

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and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction.

§22. An action to enjoin any nuisance defined in this title may be brought in the name of the United State by the Attorney General of the United States or by any United States attorney or any prosecuting at-

ARGUMENT

SUMMARY

1. The esesntial question was decided in *Murphy v. United States .... U. S., ...* (Dec. 6, 1926) wherein it was held that the statute was limited to abatement. It contemplates a proceeding in equity which, if criminal, is impossible in view of Article 3, Section 2 of the Constitution and Amendment 6. Likewise civil penalties are excluded. *Constitution, Amendment 7; Garnharts v. United States, 16 Wall. 162; United States v. The Queen, 37 Fed. Cases No. 16107.*

Similar statutes were sustained only because limited in scope to abatement. *Littleton v. Fritz, 65 Ia. 488; Carlton v. Rugg, 149 Mass. 550; State v. Crawford, 28 Kan. 726; State v. Saunders, 66 N. H. 39; Muggler v. Kansas, 123 U. S. 623; Chase v. Proprietors of Revere House, 232 Mass. 88; People v. Holschuh, 235 Mich. 272.* And in two jurisdictions they were held unconstiutional as transcending abatement. *Heddon v. Hand, 90 N. J. Eq. 583; State v. Uhrig, 14 Mo. App. 413.*

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torney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidaivits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining

2. Upon the facts no necessity exists for invoking the statute. The reasons justifying abatement expounded in *United States v. Boynton, 297 Fed. 261,* do not exist here because there is no continuing nuisance.

3. No constitutional question is involved. The construction made in *United States v. Schwartz, 1 Fed. (2nd) 718* resolves the doubt on constitutionality expounded in *United States v. Lot 29.*

POINT 1

THE ESSENTIAL QUESTION PRESENTED WAS DECIDED IN MURPHY v. UNITED STATES

This court in *Murphy v. United States,* December 6, 1926, determined that the statutory provisions here involved were limited in scope to abatement. This is precisely the contention of the appellant and constitutes the essential question certified. The appeal was based upon the contention that the statute in question but authorized the exercise of a well known chancery power and was to be interpreted as providing merely the

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the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this Act constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but ,on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the

traditional and conventional process of a court of equity upon the subject of liquor nuisances. It was argued that the statutory power did not extend to proceedings in any sense criminal, both by reason of the language of the provisions and because of the constitutional necessity that crimes be tried before a jury (Article 3, Section 2 of the Constitution, and Amendment 6), which procedure the statute in no sense contemplates. Likewise the language of the statute excludes the intent to provide for proceedings which come within the purview of the Seventh Amendment to the Constitution, for if a penalty or forfeiture was contemplated, such proceedings are suits at common law within the meaning of that amendment. *Garnharts v. United States, 16 Wall. 162; United States v. The Queen, 37 Fed. Cases, No. 16107.* Historically similar statutes have been sustained only because the powers conferred were deemed to be limited to the abatement of particular nuisances. *Littleton v. Fritz, 65 Iowa 488; Carlton v. Rugg, 149 Mass. 550; State v. Crawford, 28 Kansas 726; State v. Saunders, 66 N. H. 39; Muggler v. Kansas, 123 U. S. 623; Chase v. Proprietors of Revere House, 232 Mass. 88; People v. Holschuh, 235 Mich. 272.*

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court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety to be approved by the court making the order, in the penal and liquidated sum of not less than $500 nor more than $1,000 payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs and damages that may be assessed for any violation of this title upon said property.

In two jurisdictions similar statutes were held to be unconstitutional because it was considered that they were intended to confer criminal jurisdiction upon courts of equity. *Heddon v. Hand, 90 N. J. Eq. 583; State v. Uhrig, 14 Mo. App. 413.*

The first question certified raises the question of the scope of the statute. Its answer depends upon whether that scope is limited to justifiable acts for the purpose of abating the nuisance complained of. The case of *Murphy v. United States* asserts the principle that abatement and not penalty was contemplated. This principle needs but to be affirmed and applied in answer to the first question.

POINT 2

UPON THE FACTS STATED COMPLETE AND PERFECT ABATEMENT WAS HAD BEFORE THE ENTRY OF THE DECREE. THE DECREE ENJOINING ALL USE OF THE PREMISES FOR ONE YEAR IS SUPERFLUOUS AND UNNECESSARY AS ABATEMENT.

The provisions of law which authorize a court to prohibit for one year all use of premises upon which the nuisance in question has been conducted, are not to be understood as justifying useless, unreasonable and inequitable action. The character of abatement contemplated by the law is one known to the law. The creation of a novel field of jurisprudence was not intended.

It can always be argued that any kind of punishment in reaction to a liquor nuisance is of effect to prevent liquor nuisances generally. That is but to adopt the position that punishment prevents recurrence. An argument of this sort is answered by the fact that the abatement of a nuisance contemplated by the procedure

of a court of equity, to invoke which was the sole purpose of the statute, is limited to specific instances of nuisances and therein takes its distinction from the criminal law which aims to prevent generally recurrence of violations.

It is, of course, true that if landlords were visited with severe penalties if intoxicating liquors were found on their premises regardless of their fault, the class of persons vigilant to prevent violations of the Prohibition Act would be increased. But it is equally clear that to inflict a detriment as a general deterrent transcends the scope of an equity power to abate a nuisance as that power has been construed.

Since both the offending tenant and the offensive property had been removed the sole subject for consideration in the judgment was whether, attached to the premises there still remained especial availability by reason of their character or reputation which should require that all use be prohibited in order that the nuisance should cease.

It was asserted in *United States v. Boynton, 297 Fed. 261*, that premises may have such reputation or character that they are subject to being resorted to for unlawful purposes; and that to prohibit all use for a period of one year may be justified as necessary to perfect the abatement of the nuisance. The ultimate fact that the nuisance is a continuing one, or will be unless the remedy of prohibiting all use of the premises for a period of one year is applied, must be shown by evidence or rest upon a foundation of reason. *United States v. Boynton* is limited to the situation in which an established trade resorting to particular premises was found to exist. It is a rational presumption that Silver-

man, the tenant of the premises in question, manufactured liquor thereon for the purpose of sale, but there is no evidence of any sale having been conducted upon the premises, of any trade resorting thereto, of any notoriety which the premises had acquired. The absence of this evidence indicates that the place of distribution was elsewhere. Therefore the case here presented is one in which the premises were used as a place of secret manufacture. Any building will afford equal facilities.

It is doubtful whether the principle mentioned in *United States v. Boynton*, and seemingly approved in *Murphy v. United States*, can find any application to a situation like the instant one because there is no probability of nuisance continuation implicit in the character of the premises here. To find analogy between this case and the *Boynton case* it is necessary to depart from the consideration of the character of the premises and stretch the principle of the *Boynton case* so that it will extend to a searching of the mind of the person in control of the premises. We are not called upon to argue, nor is the court called upon to decide, whether the principle of the *Boynton case* can be so applied; for the complete vigilance and innocence of the owners necessarily limits the consideration to the character of the premises. Whatever mental element there was affecting the continuance of the nuisance was fully abated when the tenant Silverman was ousted by the landlords.

The first question, therefore, is directed to a situation in which all elements of nuisance are lacking. In substance the inquiry is whether the statute authorizes a court to declare the existence of a nuisance where none

exists; or to state the same thing differently, to prescribe a detriment by reason only of a past use of the property—to proceed against the property as an offender and to confiscate it. Regardless of whether this is possible, this statute does not contemplate anything beyond a bill in *equity* to abate, and a decree responsive to the facts proved.

POINT 3

NO CONSTITUTIONAL QUESTION IS INVOLVED

The second question depends upon an affirmative answer to the first question. We cannot contend that the statute provides for arbitrary action or that it provides for punishment, and if its scope is abatement as declared by *Murphy v. United States*, there can be no constitutional objection to its proper application. Our complaint is not directed against the statute but against its interpretation in this case.

It has been argued that this statute, when a nuisance is said to have existed, affords to the trial judge a discretion to dismiss the bill of complaint or to prohibit all use of the premises for a period of one year. We do not grasp the force of this argument, because the law was meant to be applied to situations existing in fact, and the duty of the judge is to apply the remedy as the facts require. Discretion implies the right to choose. No choice is presented and hence no discretion exists when the facts require a dismissal of the bill. Possibly where a continuing nuisance requiring abatement is shown, the trial judge has some degree of discretion as to the exact form of the remedy. The abuse of a power under the form of statutory authority is certainly not

contemplated by its terms. To sanction any kind of action under the phrase that, "Upon judgment of the court ordering such nuisance to be abated, the court may order that any building shall not be occupied or used for one year thereafter," is but to make sacred the form of language and to close one's eyes to the substance.

The constitutional objection exists only if the statute authorizes a court to regard the premises as an offender and to punish by confiscation. The constitutional objections are two-fold: (1) That such a proceeding is within the purview of the Seventh Amendment and hence jurisdiction in equity is excluded; (2) That the forfeiture of ordinary real property is so unreasonable as to lack due process of law.

The precedents for the forfeiture of property owned by innocent persons are stated by Mr. Justice Stone in *Van Oster v. Kansas, ... U. S. .... (Nov. 22, 1926).* The cases there cited are limited to personal property having special adaptability for unlawful uses (ships, vehicles, etc.) and real property devoted by the owner to uses under public regulation and hence subjected by him to special conditions and risks by reason of its special privileges (distilleries). It has never been decided that ordinary real property can be so forfeited. Such property is ordinarily leased to others for general business and residential purposes. Of it one cannot know in advance any possibility of unlawful use so that the owner may be said to part with the possession at his peril. However, this question is not deemed involved here.

The language of the statute has been construed as granting an arbitrary power in *United States v. Lot 29,*

296 Fed. 729. The opposing view, and the one which we maintain, is lucidly expressed in *United States v. Schwartz, 1 Fed. (2nd) 718.* We assume that this subject had full consideration in *Murphy v. United States* and we find it unnecessary to repeat an extended constitutional argument. It is clear that if the statute is construed to authorize only decrees justified by the facts and limited in scope to abatement, the first question here presented must be answered "No," in view of the facts of this case, and the second question is not reached. If the answer to the first question is "Yes," it must necessarily be with such qualifications as will indicate the impropriety of the decree in this case and as will render unnecessary an answer to the second question.

Respectfully submitted,

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Dated April 2, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 62

JOHN A. GROSFIELD AND RICHARD CAPLIS

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF ON BEHALF OF THE UNITED STATES

OPINIONS BELOW

This case comes before the Court on certificate from the Circuit Court of Appeals for the Sixth Circuit. The decision of the District Court was not reported.

JURISDICTION

Jurisdiction is conferred upon this Court by Section 239, Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS CERTIFIED

The Circuit Court of Appeals certified the following questions:

> 1. Is the intent of Section 22, Title II, to authorize a court of equity to close for a year,

"or until otherwise ordered by the court," premises from which the landlord has ousted the offending tenant, and this in a case where the landlord had terminated the lease promptly after he first knew or was chargeable with notice that the tenant was using the premises for the manufacture or sale of intoxicating liquor?

2. If the first question is answered in the affirmative, then was such section in this particular a constitutional exercise of the legislative power?

STATUTES INVOLVED

The statutes here involved are set forth in the appendix to this brief.

STATEMENT

The facts in this case are set out in the certificate, pages 1 and 2, as follows:

> Appellants own premises in the business district of Detroit consisting of a store building and in the rear a connected building suitable for garage and warehouse purposes. They rented the entire premises to Silverman for a wholesale grocery, and he used the rear building for storage. During this tenancy the prohibition officers found a still in operation on the second floor of the rear building. This proceeding was thereupon commenced by the filing of a bill against the tenant and the landlords, asking that the nuisance be abated. The landlords thereupon, and before this matter came on for

hearing, ousted the tenant and rented the rear building to a new tenant for legitimate purposes.

Upon the hearing of this matter the landlords offered to show that they had no participation in nor knowledge of the unlawful use by Silverman and had no reason to be put upon notice that Silverman was permitting or causing any such unlawful use—in other words, that they acted entirely in good faith in renting to him and had no reason to believe anything wrong until learning of the discovery of the still, and that they thereupon ousted their offending tenant.

The District Judge considered that this offered testimony was immaterial, refused to permit the testimony, and entered an order that the rear building was a common nuisance as defined in Title 2 of the National Prohibition Act; that the nuisance be forever abated; "that said real estate shall not be occupied for any purpose for the period of one year from the date of this decree or until the further order of this court herein, commanding and directing that all persons be prohibited from entering in or upon said premises for the period of one year from the date of this decree, or until the further order of this court herein; and further commanding and directing that all persons be prohibited from taking away, moving, or in any manner interfering with the contents of said premises." It was further ordered that the Marshal "close the said premises for use or occupancy for the period of one year."

It is contended by the United States that the order was justified under Section 22 of Title 2 of the National Prohibition Act; it is contended by appellants that since, under Section 21, the premises could not even be subjected to a lien for costs unless the landlords had knowledge or reason to believe that the building was being unlawfully used, Congress could not have intended to subject his property to the more complete forfeiture of Section 22, in the absence of such knowledge or reason to believe; and that if Section 22 is to be considered as intending to give the power here exercised the appellants' property is taken without due process of law.

SUMMARY OF ARGUMENT

The District Court correctly interpreted Section 22, Title II, of the National Prohibition Act, as requiring a literal application. This is shown by the language of the statute itself, which is to the effect that it shall not be necessary for the court to find that the property involved was being unlawfully used at the time of the hearing on the Government's petition for an abatement of the nuisance, but on finding that the material allegations of the petition are true the court shall issue an abatement order, and in addition thereto may order the premises closed for a year, or issue such other incidental orders as in its discretion it may deem necessary to make the abatement order effective. The trial judge accordingly held that appellants' attempted showing of a lack of knowledge

of the existence of a nuisance and of their ouster of the offending tenant since the filing of the Government's suit was immaterial to the issue then before him, which was whether a nuisance existed as alleged in the petition. The court's jurisdiction to issue the abatement order and all incidental orders following thereafter rests upon the conditions existing at the time the bill was filed. Anything occurring between that time and the time of final hearing becomes, as the statute declares and the trial court held, immaterial to the basic inquiry.

Appellants' claim that a nuisance no longer existed to abate refers to the time of hearing and not, as the statute contemplates, to the time the petition was filed. The existence of a nuisance having been found by the court on evidence which must here be deemed to have been sufficient, it was bound under the statute to abate the same, and to this end it could close the premises for a year or exact a bond for their lawful use if in its discretion it considered such action necessary to the effective enforcement of the abatement order. Moreover, the ouster of an offending tenant and the securing of a new lessee may not be a sufficient guarantee against the evils sought to be remedied. Other steps may be necessary to a complete abatement of the nuisance, since the purpose of the statute is not only to stop the nuisance but to prevent a recurrence of the offensive conditions.

68950—27——2

To adopt appellants' contention would call for a continual policing of the premises involved and bring about a multiplicity of suits, which apparently it was the purpose of Congress to prevent. Furthermore, the statute provides a mode of relief, available to appellants, from the burdensome effect of a closing order.

That Congress intended a literal interpretation of the statute, as applied by the trial court, is plainly shown by the legislative history of the act and finds ample support in Federal and state court decisions.

So construed the statute is not an unconstitutional exercise of legislative power. It in no sense involves a taking of property without due process. It is but the exercise of a power, now well recognized as existing in Congress, to adopt such means as are reasonably necessary and appropriate to carry out the constitutional mandate and the enforcement statute.

Both questions certified should be answered in the affirmative.

ARGUMENT

I

Nature of questions certified

The questions certified in this case go one step farther in probing the intent of Congress in the nuisance sections of the National Prohibition Act than the one propounded by the Circuit Court of Appeals for the Third Circuit in *Murphy* v. *United*

States, 272 U. S. 630, decided by this Court last term. In the *Murphy case* it was held that an acquittal under Section 21, whose object is to punish, did not preclude a court of equity from proceeding on the same facts under Section 22, because the object of the latter section is to protect the community by removing an offending condition, and financial loss which may result to an owner of the premises, personally innocent of wrongdoing, from padlocking the place does not change the essential objects of the statute from abatement to forfeiture, the right of the court to order the place closed for a year being but an incident to the general duty to take such steps as appear necessary to insure a restoration of the premises to lawful use.

Here the inquiry is whether Congress could have meant that a court should order the premises closed for a year if the owner has terminated the lease of the offending tenant by the time the injunction suit comes on for hearing. Yet the statute so provides, and all that the District Court did in this case was to follow the statute literally. Doing so, however, appellants argue, was taking a "useless, unreasonable, and inequitable action," one that in spite of the words used, Congress could not have intended. Although it would seem that therein lies their real grievance, appellants fail to charge that the trial court abused his discretion. They rest their claim to reversal on urging a more lenient interpretation than the literal meaning of Section 22. The real

consideration is, therefore, whether Congress meant exactly what it said in Section 22, or something less.

II

Section 22 requires a literal application

Condensing relevant portions, Section 22 reads:

> If it is made to appear by affidavits or otherwise, to the satisfaction of the court, * * * that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or *permitting the continuance* of such nuisance until the conclusion of the trial. * * * It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid *at the time of the hearing*, but on finding that the material allegations of the petition are true, the court *shall* order that no liquors shall be manufactured, sold, etc., * * * in such * * * place * * *. And upon judgment of the court ordering such nuisance to be abated the court *may* order that the * * * place shall not be occupied or used for one year thereafter; but the court *may, in its discretion,* permit it to be occupied or used if the owner * * * shall give bond * * * conditioned that intoxicating liquor will not thereafter be manufactured, sold, etc., thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation * * * upon said property. (Italics ours.)

(A) Power of the court before hearing on the merits

Plainly the statute intends that as soon as suit is filed, before trial, the court may restrain the own from "*permitting*" the continuance of the nuisance. The choice of that word could mean nothing less than the right to order a landlord to discipline or get rid of an offending tenant or employee pending a hearing on the merits of the injunction. Whether such preliminary order was issued in this case is not revealed by the brief statement of facts, but one would assume that it was not, since appellants claim all the credit for ousting the tenant Silverman and urge that thereby they "voluntarily" abated the nuisance, and the statute did not intend that the court should proceed thereafter. It is unlikely, however, that Congress would divest the court of power to go further in the various steps of Section 22 if the landlord acted *without* specific order, when before notice or hearing the court might have compelled the very action taken by defendants here as a mere preliminary step in the proceedings. Moreover, the claim that ousting Silverman was voluntary is unfounded. It was not done until after suit was commenced and the landlords were made parties defendant.

It is, of course, well settled that when a nuisance has been abated or suppressed, by the parties themselves charged with maintaining it, prior to the commencement of the action to abate, the prosecution of such action can not be continued. Joyce on Nuisances, Section 486; Wood on Nuisances, 2d Ed.,

Section 864. But the rule is limited to a time prior to commencement of proceedings. *Saunders* v. *State,* 66 N. H. 39, 84; *State* v. *Strickford,* 70 N. H. 297. An abatement by the parties after the issuance of a temporary injunction and before trial on the merits is too late. *Drummond* v. *Drug Company,* 133 Iowa, 226. Furthermore, the abatement must be voluntary and in good faith. *Eckert* v. *Davis,* 75 Iowa, 302. And it is not voluntary when the abatement comes after the owner has been aroused to activity by the action of the State (*State* v. *Humphrey,* 94 Wash. 599), or when it comes as a result of *vis major,* such as an arrest and seizure (*United States* v. *Margolis* (S. D. Cal.), 289 Fed. 161). The facts in the instant case distinctly show that the ouster of Silverman came about as the result of a coercive process of the law, amounting to *vis major,* and hence appellants stand in no different position than they would if their action had been taken in response to a preliminary court order.

(B) The court's duty at the time of hearing

On the date of trial, the landlords, in an effort to defeat further proceedings under Section 22, offered to show what they had done *since the bill was filed* to abate the nuisance. The District Judge refused to consider that as having any connection with the issue on trial, which was whether in fact a nuisance was maintained on the premises in question, according to the allegations of the petition. His ruling was in harmony with Section 22. As if

desiring to forestall just such contentions as made in this case, Congress expressly said "it shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall" do certain things and may do others. Here the court found the allegations of the bill to be true, and appellants in no wise attack that finding. In effect, they argue that the court is to "find" concerning the truth of the petition only in the event it finds against, and only after first hearing the landlord's recital of his lack of knowledge and what he may have done to ameliorate conditions since the Government filed the bill. This not only is contrary to the statute, but it offends orderly procedure. Anything occurring between the time of the filing of the bill and the time of final hearing—whether it be destruction of a still or evacuation by an offending tenant—becomes, as the statute declares, and as the trial court held, immaterial to the basic inquiry, though, of course, the court may consider it as one of the elements for the exercise of its discretion in issuing incidental orders to carry the decree into effect. The thing which the court acts on is the offensive condition of the premises as alleged in the bill when found upon hearing to be true. Upon the condition existing at the time of filing the bill rests the court's jurisdiction to issue the order of abatement and all incidental orders following thereafter.

Appellants say that the court refused to let them show that a nuisance did not exist, but they refer to the time of the hearing. They do not claim that the nuisance alleged in the petition did not exist and did not exist at the time the petition was filed. The statute is based on one thing, their claim on another. The statute does not jump from one set of conditions to another, and neither was the court required to do so. Under the statute, there was, at the time to which it distinctly applies, a nuisance to abate; and the court, having found the requisite facts, was bound to abate it and further to determine how drastic a closing order was necessary to insure the actual abatement.

(C) Responsibility of court to make abatement effective by incidental orders

Thus far the court was under statutory mandate to act, but following the finding of fact that the nuisance as alleged existed, and the issuance of an order that no liquors shall be manufactured, sold, or stored there, the court was bound to decide whether to stop, or to go further into a control of the use of the premises by closing them or exacting a bond for their lawful use. This called for the exercise of a sound discretion.

The statute is silent on how the judge is to formulate that discretion in each case, but, naturally, many facts enter into consideration. Although there is no point raised as to abuse of discretion by the trial court in this case, the basis assumed

for urging a negative reply to the question certified is that where the owner has acted promptly to oust an offending tenant as soon as suit is brought there is no need for the closing order, and Congress could not have intended the court to use it in such cases. But that ignores the real purpose of the closing order, which is *to make the abatement effective.* It may well be that the landlord's ouster of the tenant is not a sufficient guarantee. *Denapolis* v. *United States* (C. C. A. 5th) 3 F. (2d) 722. The facts as certified do not show all the evidence which was before the court with respect to the nature of the nuisance or why it was deemed necessary to issue the closing order. Silverman rented the whole premises, maintaining a grocery store in the larger building and operating a still in the storeroom in the rear. It does not appear from the record whether Silverman was ousted from *all* the premises. The decree only covered the storage building, and the certificate states that the landlords rented the *rear building* to a new tenant for legitimate purposes.

The trial court may have issued the closing order because Silverman remained in close proximity to the premises, where old patrons could still easily and secretly be served. Perhaps the new tenant was not a citizen, or had been convicted of crime, or was a relative, employee, or in some other way connected with Silverman. Ouster of a tenant is but

one of the many steps which may become necessary in a complete abatement of a nuisance. It can not be assumed, as appellants do here, that it alone would be sufficient to insure discontinuance of offensive conditions. The law is concerned with the unlawful use of the *res* which a court of equity is commanded (when the allegations of the bill are found substantially true) to change, and which the court has the additional power of controlling for a period of a year for the purpose of insuring to the public that the offending condition will not be brought back. All of appellants' argument seems to be predicated upon a theory that the congressional purpose of Section 22 was merely to *stop* the offensive use discovered on the property. That is part of the intent of Section 22, but is not all. The object is to stop the discovered nuisance and also to safeguard society from any recurrence of the condition within a reasonable period; and Congress has deemed one year to be such reasonable period during which the court can exact from the owner of the property *increased* responsibility for its lawful use.

Conceivably, if appellants' argument is sound, after the owner was served with the bill of complaint, he could have switched tenants for the storehouse, changed the condition complained of in the bill for a period of thirty to sixty days, and avoided his own liability when the hearing took place. Under such circumstances there would be nothing to

prevent him from permitting the old tenant to re-enter immediately after the termination of the hearing on the bill of complaint. The Government would be obliged then to watch for a second offense and institute suit all over again. Congress undoubtedly had in mind the prevention of such multiplicity of suits when it used the language, "It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid *at the time of the hearing*" and "the court *may* order that the * * * place shall not be occupied or used for one year thereafter." Thus Section 22 shuts down upon the excuses which the landlord can present as to why the court of equity lacks power to act, limiting him to such showing as he can make of ameliorated conditions *prior to the filing of the bill.* For, having decreed that a *res* harbors an offending condition, it follows, from the language used, that Congress intended the court of equity to exercise its sound discretion to the end that that condition would not only be changed, but that the owner would be compelled to exercise increased vigilance to keep it changed. The court, within its discretion, may either close the premises entirely for a year or less, or exact a bond from the owner by the terms of which he will be made an insurer for the benefit of society against unlawful use of his property. Thus for at least one year the Government could "rest on the owner's bond" and not be

obliged to set a police watch over the property and bring a series of suits to successively oust unwholesome tenants. Congress plainly intended by the language chosen that the court should shift to the owner of the property a share in the duty of keeping nuisances out, either by closing order or by exacting a bond, as the discretion of the court in each case may dictate.

(D) The statute provides relief for owners affected by closing orders

As suggested above, the statute contemplates that the same court which issued the closing order padlocking the premises for a year may lift the burden of such order and permit the premises to be used under a bond guaranteeing increased vigilance to insure lawful use, and providing for payment of all costs, fines, and damages arising from offenses committed thereon. The statute thus offers affirmative relief to owners on whom the closing order falls with heavy financial burden. This relief has been designated by this Court in the *Murphy case* as an "alternative" means of making the abatement effective. It is, however, the only alternative intended to be permitted by Congress, and appellants should have claimed their relief under it. Had they made application to reopen the premises and offered to give bond, the court could then have weighed their good faith, their vigilance, the ouster of the tenant, and the selection of the new lessee against the reputation of the place, the type of

violation conducted thereon, and the probability of its recurrence.

Appellants preferred to rely upon a strained interpretation of the statute, by which if they are successful they may be excused from assuming the obligations of the bond and from exercising continual vigilance over the premises for a year. To compel them to assume these obligations, we maintain, was the plain intent of the statute in furnishing this mode of relief. There is no merit in appellants' contention. It urges a construction of Section 22, which would multiply the difficulties of the Government's efforts to change the use of premises where maintenance of a nuisance had become a fixed community tradition and habit, would lead to a multiplicity of suits, would evade the intent to make the owner of the premises a partner with the Government in the responsibility for the discontinuance of an offensive use once the fact of that use has been established, would offend the ancient rule by which a court of equity has the power to make effective its decrees, and would be a tortured construction of the plain words which Congress used. Congress provided an avenue of escape from the burden of this closing order if appellants wish to avail themselves of it. Failing to take that step, we can only assume that they were unwilling to submit to the discretion of the trial court and assume the responsibility for the kind of vigilance over the property which the statute provides.

III

Legislative history and authorities support a literal interpretation of the statute

(A) Legislative history

The reports of the committees of the Senate and House having the bill in charge indicate that Congress intended the words used to have the meaning contended for by the Government. When H. R. 6810 (which afterwards became the National Prohibition Act) was reported by the House Judiciary Committee, it was stated (House Reports No. 91, Part I, June 30, 1919, on page 7):

> Title II for the enforcement of the Eighteenth Amendment has in it no new or supplemental feature. Every provision in it has precedents in State or Federal legislation.

The precise precedents found in state legislation and considered in framing Section 22 are enumerated in a memorandum accompanying Report No. 151 of the Senate Judiciary Committee, to accompany H. R. 6810, which on page 17 states:

> The following States have laws providing for injunction proceedings: Alabama (secs. 19 and 20 of acts of 1915); Arkansas (sec. 12 of act of 1917); California (sec. 6 of prohibition law); Georgia (sec. 4 of act of 1916); Indiana (sec. 21 of prohibition act, effective 1918); Iowa (secs. 2405–2410); Michigan (sec. 1, nuisance act); Mississippi (sec. 22 of law enforcement act of 1916); Montana (sec. 6, ch. 143); Nebraska (secs. 28 to 34 of act effective May 1, 1917); North Dakota (secs.

9373–9374); Oregon (sec. 22, general laws of 1915); South Carolina (sec. 819); South Dakota (sec. 65, act of 1917); Tennessee (nuisance laws, chs. 1 and 2); Utah (secs. 10–13, act 1917); Virginia (sec. 34, prohibition act); West Virginia (sec. 17).

These laws are set out in the appendix to this brief.

To avoid the creation of any new or experimental features in the National Prohibition Act, Congress undoubtedly adopted the features of the above-considered statutes, which, in the experience of the States, had proved sound. Likewise it rejected some of their features which either had proved impracticable or which Congress considered might prove impracticable. What Congress intended, therefore, may be shown by the parts of state legislation it adopted; what was not intended should be apparent from the features which it did not adopt.

Some of the state statutes contained specific provisions for the protection of a landlord against a closure order under conditions similar to those involved in this case, viz:

(I) In California (c. 132, Sec. 3, Stats. 1915, p. 237) a temporary injunction is allowed only when the court is satisfied that the owner has received written notice of the existence of the nuisance at least two weeks prior to the filing of the complaint.

(II) In North Dakota (Sec. 9373, R. C. 1905, when leasehold premises are adjudged to be a nuisance, the owner shall have the

right to terminate the lease by giving three days' notice to the tenant, and when this is done the premises shall be turned over to the owner upon order of the court.

(III) In Oregon (c. 141, Sec. 19, Gen. Laws 1915, p. 160) anyone who, after being notified in writing, omits to take all proper measures either to abate the nuisance or, failing therein, to eject therefrom persons so using the property shall be deemed guilty of assisting in the maintaining of such nuisance.

(IV) In Utah (c. 2, Sec. 11, Laws 1917, p. 9, procedure for abatement shall be as provided in c. 99, Sec. 2, Laws 1913, p. 189) when the owner is not in actual possession, he shall have notice of the nuisance and a reasonable time to abate it.

Had Congress intended that the owner of the property should have an opportunity to eject the offending tenant and that such ejectment, when accomplished before a final hearing, should of itself constitute an abatement of the nuisance so as to preclude further action by the court, undoubtedly provisions similar to and equally explicit with the provisions of the state statutes above referred to would have been incorporated in Section 22. Since no language even remotely resembling them was used, it must follow that their meaning was not intended by Congress. And on the contrary, Congress evidently followed those precedents which not only made no provision for abatement by a

landlord, but which contained a specific provision for release on bond, as in the Iowa statutes.

Appellants rely upon the construction placed on Section 22 in *United States* v. *Schwartz* (Mass.), 1 F. (2d) 718, wherein the court held that the nuisance statutes of Massachusetts furnish an analogy for the construction of Section 22, and it accordingly construed Section 22 as though it contained the same provisions as the general laws of Massachusetts, 1921, c. 139, Secs. 4–11. The Massachusets Act provides that the owner becomes a contributing factor in the nuisance when—and only when—he has had an opportunity to repossess himself of his property and has failed to do so. The analogy is inapplicable, first, because the Massachusetts statute was enacted subsequent to the National Prohibition Act, and, second, because Congress had considered identical legislation in the statutes of California, North Dakota, Oregon, and Utah and had apparently refused to follow precedents therein contained.

Furthermore, striking evidence that Section 22 did not contemplate conditions at the time of hearing is found in the memorandum accompanying Senate Report No. 151 (*supra*) which, on page 17, states:

> The provision stating it shall not be necessary to prove that the place is being unlawfully conducted at the time of the hearing is not a new one. Section 17 of the West Vir-

ginia law has in it the same provision. It reads as follows:

"It shall not be necessary for the court to find that the premises involved were being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the bill are true the court shall order, etc."

This provision aids prosecuting officers in the trial of cases against the plea of liquor dealers' attorneys that they have ceased to operate the liquor nuisance, and by this means they sometimes defeat the application of the writ.

(B) Judicial construction

Appellants assail the power of the court to abate the nuisance, asserting as obstacles to the exercise of that power (1) that they had no knowledge of the alleged violation by the tenant, and (2) that upon discovery thereof, after service of the Government's process, they ejected him. Their contentions in both of these respects have been foreclosed by decisions of both the Federal and the State courts.

When Congress adopts a state statute substantially as it exists in the legislation of the State, it adopts also the known and settled construction given that statute by the courts of that State. *Willis* v. *Eastern Trust and Banking Company*, 169 U. S. 295, 307; *Capital Traction Company* v. *Hof*, 174 U. S. 1, 36. According to the settled construction in the States where equitable remedies against liquor nuisances have been in force and these reme-

dies are not restricted by peculiar legislation making knowledge a necessary element to the exercise of the remedy, it is settled that want of knowledge on the part of the owner is immaterial and does not affect the right of the sovereign to abate the nuisance. *State ex rel. Dow* v. *Nichols,* 83 Wash. 676 *People ex rel. Bradford* v. *Barbiere,* 33 Cal. App. 770; *Martin* v. *Blattner,* 68 Iowa 286; *State* v. *Knapp,* 178 Iowa 25; *State* v. *Clark,* 189 Iowa 492; *State ex rel. Seeburger* v. *Deemey* (not yet officially reported), 210 N. W. 909. Even in absence of the statutory remedy want of knowledge can not affect the inherent powers of a court of equity to abate a nuisance. *State ex rel. Kern* v. *Emerson,* 90 Wash. 565.

In commenting upon a Kansas nuisance statute, this Court, in *Van Oster* v. *Kansas,* 272 U. S. 465, 467, said:

> It is not unknown or indeed uncommon for the law to visit upon the owner of the property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it. Much of the jurisdiction in admiralty, so much of the statute and common law of liens as enables a mere bailee to subject the bailed property to a lien, the power of a vendor of chattels in possession to sell and convey good title to a stranger, are familiar examples. They have their counterpart in legislation imposing liability on owners of vehicles for the negligent operation by those entrusted with their use,

> regardless of a master-servant relation. Laws of New York, 1924, c. 534; Michigan Pub. Acts, 1915; Act. No. 302, Sec. 29 (constitutionality upheld, *Stapleton* v. *Independent Brewing Co.*, 198 Mich. 170). They suggest that certain uses of property may be regarded so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoers and the alleged innocent owner.

See also *Goldsmith-Grant Co.* v. *United States*, 254 U. S. 505.

Among the lower Federal courts which have considered this question under Section 22, the weight of opinion is that want of knowledge on the part of the landlord does not affect the power of the court. *United States* v. *Boynton* (E. D. Mich.), 297 Fed. 261, 267; *United States* v. *Studio Club* (S. D. N. Y.), 12 F. (2d) 462; *United States* v. *Archibold* (S. D. N. Y.), 4 F. (2d) 587; contra, see *United States* v. *Schwartz* (Mass.), 1 F. (2d) 718.

But it was contended (Cert. p. 2), though apparently abandoned in the brief before this Court, that the provisions of Section 21, putting a lien for costs and fines on the premises only when the owner had knowledge or reason to believe that the building was being unlawfully used, should be read over into Section 22 as applying there as well, and that in view of the restriction in Section 21 Congress could

not have intended to subject owners to greater financial burden and more complete forfeiture by enforced disuse of valuable property by such closing order as here made under Section 22. This argument overlooks the marked differences in the purposes of Sections 21 and 22. The former is penal and attaches a lien to the *res* on account of the criminal liability of the owner or some one else. The purpose of the latter is prevention. It is true that in some instances when comparing extreme cases a closing order for a year issued under Section 22 may result in more pecuniary loss to the owner than it would to have a lien placed on his property for a small fine imposed upon a bartender who kept a nuisance there. Nevertheless, in the eye of the law it is quite a different thing to attach a *prohibition on the use of property* than to impose a lien for the satisfaction of which the property may be sold. In the latter instance the ownership or seizin is jeopardized. In the former the enjoyment merely is disturbed. In the one case property would be taken without due process of law; in the other taking of property in the constitutional sense is not involved, although pecuniary loss may result from the court's decree.

In *State ex rel Seeberger* v. *Deemey,* 210 N. W. 909, and in *State ex rel. Seeberger* v. *James,* 211 N. W. 372 (neither decision being yet officially reported), the Supreme Court of Iowa decided against contentions similar to the ones here urged

which arose under almost identical facts. Though the decisions come too late to bring them within the rule that Congress adopted them as a rule of construction for Section 22, they are persuasive as construction of analogous legislation.

The precise question here involved was considered in *Schlieder* v. *United States* (C. C. A., 5th), 11 F. (2d) 345, 347, wherein the court said:

> It is the contention of the appellants that the property of an innocent owner can not be ordered closed after the ejectment of the tenant and the abatement of the nuisance. There would be much force in this contention if it were not for the provision allowing the owner to bond the injunction. This is a reasonable requirement as a guaranty of good faith, and to insure that the property will not again become a nuisance, for a period sufficient for it to lose its character and reputation as a place where liquor may be purchased. This provision affords ample protection to an innocent owner.

IV

Literally construed, section 22 is not an unconstitutional exercise of legislative power

Appellants, relying upon their construction of Section 22, say that no constitutional question is involved. The Government, urging that the first question be answered in the affirmative, accordingly contends that this construction does not make the statute unconstitutional.

Ever since *Mugler* v. *Kansas,* 123 U. S. 623, 668, 669, it has been regarded as settled that the mode of abatement now provided in Section 22 is not unconstitutional, either as denying a jury trial or as taking property for public use without compensation, or as denying due process. Nor is it in excess of the legislative power to call into operation all the powers of a court of chancery to suppress the liquor traffic. *Eilenbecker* v. *Plymouth County,* 134 U. S. 31, 40.

Whatever means are reasonably necessary to abate such a nuisance, even to the extent of taking or destroying the property of an innocent owner, may be adopted without infringing any constitutional rights. *Mugler* v. *Kansas, Supra; Lawton* v. *Steele,* 152 U. S. 133; *Northwest Laundry Co.* v. *Des Moines,* 239 U. S. 486; *United States* v. *Boynton,* 297 Fed. 261, 266.

In testing whether the statute goes beyond the reasonable demands of the occasion, it must first be conceded that the largest legislative discretion is allowed in determining not only what the public interests require, but also what measures are necessary for the protection of such interests. *Stone* v. *Mississippi,* 101 U. S. 814, 819. Congress may adopt not only means that are necessary, but those that are convenient to the exercise of its power. *United States* v. *Hoke,* 227 U. S. 309. Under this doctrine Congress has the power to retain control of the premises, through the courts, long enough to

make sure of the abatement. Allowing a year for this purpose is not unreasonable. *Murphy* v. *United States, supra.*

When Congress dispensed with the necessity of inquiry as to collusion between the wrongdoer and the alleged innocent owner, it was well within its power. *Van Oster* v. *Kansas, supra.*

"Having regard to the artifices which are used to promote the sale of intoxicants" (*Purity Extract and Tonic Co.* v. *Lynch, supra,* p. 205), and considering the possibility that violations can readily continue on the premises though the property be in the hands of a new tenant (*Silz* v. *Hesterberg,* 211 U. S. 31, 40), it can not be said that the statute "passes the bounds of reason and assumes the character of a merely arbitrary fiat."

Under the doctrine of *Mugler* v. *Kansas, supra,* Congress has the power to abate a liquor nuisance. But that power without an effective means of enforcement would be bare indeed. Closure of the premises after the offending tenant has been lodged in jail has always been considered reasonable and needful to render the power of abatement effective, for otherwise there would be no need of equity to supplement the criminal law. The same may be said of closure after the seizure of the stock in trade. It is difficult to see how the ejectment of the tenant at the hands of the landlord would render closure by the court any more unreasonable or unnecessary, especially in view of the rule that equity

seeks not a temporary stoppage but a permanent abatement.

The principles stated in *Goldsmith-Grant Co.* v. *United States,* supra, may have a bearing here.

And if Congress may constitutionally adopt such measures as are reasonable, appropriate, and needful to render effective the exercise of such powers, it may require the owner of property to do more than merely oust his tenant *pendente lite.* It may require an owner who has already failed to discharge his common-law duty of keeping his property from becoming a nuisance (*Moore* v. *State,* 107 Tex. 490, 495) to give security that he will not again permit it to be used unlawfully for the period of one year.

CONCLUSION

It is respectfully submitted that each question certified should be answered in the affirmative.

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OCTOBER, 1927.

APPENDIX

Sections 21, 22, and 23, Title II, of the National Prohibition Act (c. 85, 41 Stat. 305, 314; U. S. C., Title 27, Sections 33, 34, and 35), provide:

> SEC. 21. Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction.
>
> SEC. 22. An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting

attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this Act constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in

the penal and liquidated sum of not less than $500 nor more than $1,000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property.

SEC. 23. That any person who shall, with intent to effect a sale of liquor, by himself, his employee, servant, or agent, for himself or any person, company, or corporation, keep or carry around on his person, or in a vehicle, or other conveyance whatever, or leave in a place for another to secure, any liquor, or who shall travel to solicit, or solicit, or take, or accept orders for the sale, shipment, or delivery of liquor in violation of this title is guilty of a nuisance and may be restrained by injunction, temporary and permanent, from doing or continuing to do any of said acts or things.

In such proceedings it shall not be necessary to show any intention on the part of the accused to continue such violations if the action is brought within sixty days following any such violation of the law.

For removing and selling property in enforcing this act the officer shall be entitled to charge and receive the same fee as the sheriff of the county would receive for levying upon and selling property under execution, and for closing the premises and keeping them closed a reasonable sum shall be allowed by the court.

Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease.

STATE LIQUOR NUISANCE LAWS REFERRED TO IN MEMORANDUM ACCOMPANYING REPORT NO. 151 ON H. R. 6810 BY THE SENATE JUDICIARY COMMITTEE

General Acts Alabama, 1915 (Act of January 23, 1915), pp. 14–16:

> SEC. 20. That the nuisances named in the preceding section may be abated by a proceeding in equity in a court of competent jurisdiction, and the State attorney general, * * * or any prosecuting officer * * * may upon their relation file a bill in the name of the State of Alabama in the chancery court, or other court possessing equity jurisdiction, in the county where the nuisance exists, to abate and perpetually enjoin the same. * * * The owner of and all persons interested in the building or premises where the nuisance exists, or any agent renting the same, as well as the keeper thereof, may be joined with the keeper as parties defendant to the proceedings, and all such owners, keepers, parties interested, or agents who may be found to have knowingly assented to the keeping or maintaining of such nuisance on the premises at any time within six months prior to the commencement of the suit, and their servants, lessees, and tenants, shall be perpetually enjoined from maintaining and keeping, or suffering to be kept and maintaining, such nuisance, or any liquor nuisance, upon the said premises. The court shall have full power and authority to maintain its jurisdiction and by all suitable orders and writs to enforce its decrees in respect to the subject matter of the suit, and to so shape and mold its decrees as to accomplish the purpose of the bill; and all the rules of evidence, practice, and procedure, except as otherwise herein provided, that pertain to courts of

equity generally, or that exist by virtue of any law of this State, may be invoked and applied in any such injunction proceeding instituted hereunder. Upon the final hearing of the case instituted to abate a liquor nuisance, if it shall appear that the bill has been sustained by the evidence, or has been taken or confessed, the court shall order an abatement of the nuisance, which order shall direct the destruction of all such prohibited liquors and beverages as are found upon the premises, together with all signs, screens, bars, bottles, glasses, and other movable property used in keeping and maintaining said nuisance and the destruction of all such liquors and beverages, and such movable property as may have been seized under authority of the court pending the hearing of the cause. * * *.

Acts of Arkansas, 1917, Vol. I (Act of January 24, 1917), p. 49:

SEC. 12. * * * Any place or room kept or maintained in violation of the provisions of this section shall be deemed to be a common nuisance and may be abated by writ of injunction issued out of a court of jurisdiction upon a bill filed in the name of the State by the Attorney General, or any prosecuting attorney whose duty requires him to prosecute criminal cases on behalf of the State, in the county wherein the nuisance is maintained, or by any citizen or citizens of such county, such bill to be filed in the county in which the nuisance exists. And all rules of evidence and the practice and procedure that pertain to courts of equity generally in this State may be invoked and applied in any injunction procedure hereunder.

California, Statutes and Amendments to the Codes, 1915 (Act of April 28, 1915), p. 237:

> SEC. 3. The complaint in such action must be verified unless filed by the district attorney. Whenever the existence of such nuisance is shown in such action to the satisfaction of the court or judge thereof, either by verified complaint or affidavit, and the court or judge is satisfied that the owner of the property has received written notice of the existance of such nuisance, signed by the complainant or the said district attorney at least two weeks prior to the filing of the complaint, the court or judge shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of such nuisance. On granting such writ the court or judge must require, except when it is granted on application of the people of the state, written undertaking on the part of the applicant, with sufficient securities, to the effect that he will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled thereto.
>
> SEC. 5. If the existence of the nuisance be established in an action as provided herein, an order of abatement shall be entered as part of the judgment in the case, and plaintiff's costs in such action shall be a lien upon such building and place, enforceable and collectible by execution issued by order of the court.

Georgia Laws, 1915, Ex. Sess. (Act of November 17, 1915), p. 81:

> SEC. 4. * * * Any place or room kept or maintained in violation of the provisions

of this section shall be deemed to be a common nuisance and may be abated by writ of injunction issued out of the superior court upon a bill filed by the State Attorney General or the solicitor general of the circuit, or by any citizen or citizens of such county, such bill to be filed in the county in which the nuisance exists. And all rules of evidence and the practice and procedure that pertain to proceedings in equity generally in this State may be invoked and applied in any injunction procedure hereunder.

Indiana Acts, 1917, 70th Sess. (Act of February 9, 1917), pp. 25–26:

SEC. 21. The attorney general, prosecuting attorney, or any citizen of the county where such nuisance as defined in section twenty (20) exists, or is kept or maintained, may maintain an action in the name of the State of Indiana to abate and perpetually enjoin such nuisance. The plaintiff shall not be required to give bond in such action, and upon judgment of the court ordering that such nuisance shall be abated such court shall also order that said room, house, building, structure, boat, or place of any kind shall be closed for one (1) year or until the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety to be approved by the court making the order in the penal sum of one thousand (1,000) dollars, payable to the State of Indiana, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, or given away or furnished or otherwise disposed of thereon or therein or kept thereon or therein with intent to sell, barter, or give away or otherwise dispose of the same, contrary to the law, and that he will pay all fines, costs, and damages that may be assessed against him for any vio-

lation of this act; and in case of the violation of any condition of such bond the whole amount may be recovered as a penalty for the use of the county wherein the premises are situated. * * *

Iowa Code, 1897, pp. 835, 839, 840:

SEC. 2405. Whenever a nuisance is kept, maintained, or exists, as defined in this chapter, any citizen of the county may maintain an action in equity to perpetually enjoin and abate the same. In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor, allow a temporary writ of injunction without bond, if it shall be made to appear to the satisfaction of the court or judge, by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the plaintiff may elect, unless the court or judge, by previous order, shall have directed the form and manner in which it shall be presented, that the nuisance complained of exists. Three days' notice in writing shall be given the defendant of the hearing of the application, and, if then continued at his instance, the writ as prayed shall be granted as a matter of course. * * *

SEC. 2408. If the existence of the nuisance be established in a civil or criminal action, an order of abatement shall be entered as a part of the judgment in the case; which order shall direct the destruction of the liquor, the removal from the building or place of all fixtures, furniture, vessels, or movable property used in any way in conducting the unlawful business and sale thereof, in the manner provided for the sale of chattels under execution, and the effectual closing of the building, erection, or place against its use for

any purpose prohibited in this chapter, and so keeping it for a period of one year, unless sooner released. * * *

SEC. 2410. If the owner appears and pays all costs of the proceeding, and files a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk, auditor, and treasurer of the county, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within a period of one year thereafter, the court, or, in vacation, the judge, may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be an action in equity, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law.

Laws of Mississippi, 1916 (Act of February 16, 1916), p. 128:

SEC. 22. * * * Any place or room kept or maintained in violation of the provisions of this section shall be deemed to be a common nuisance and may be abated by writ of injunction issued out of a court of equity upon a bill filed in the name of the state by the state attorney general, or any district or county attorney whose duty requires him to prosecute criminal cases on behalf of the state, in the county wherein the nuisance is maintained, or by any citizen or citizens of

such county, such bill to be filed in the county in which the nuisance exists. And all rules of evidence and the practice and procedure that pertain to courts of equity generally in this state may be invoked and applied to any injunction procedure hereunder. * * *.

Laws of Montana, 1917 (Act of March 5, 1917), pp. 240–241:

SEC. 6. It shall be unlawful for any person owning, leasing, renting, or occupying any premises, building, structure, room, vehicle, or boat to knowingly permit intoxicating liquors to be manufactured, sold, exchanged, given away, bartered, furnished, or otherwise disposed of contrary to law, or to be kept with intent to sell, exchange, give away, barter, furnish, or otherwise dispose of the same in violation of law therein or thereon; and all premises, buildings, structures, rooms, vehicles, and boats wherein or whereon intoxicating liquor is manufactured, sold, exchanged, given away, bartered, furnished, or otherwise disposed of, or kept with intent to sell, exchange, give away, barter, furnish, or otherwise dispose of contrary to law, are common nuisances and may be abated as such, and upon conviction of the owner, lessee, tenant, or occupant of any premises, building, structure, room, vehicle, or boat of a violation of the provisions of this section the court shall order such nuisance to be abated, and shall order that such premises, building, structure, room, vehicle, or boat be closed until the owner, tenant, or lessee or occupant thereof shall give bond, with a sufficient surety, to be approved by the court making the order, in the penal sum of One Thousand ($1,000) Dollars, payable to the State of Montana, and conditioned that intoxicating liquor will not thereafter be

manufactured, sold, given away, bartered, furnished, or otherwise disposed of, or kept therein or thereon with intent to sell, exchange, give away, barter, furnish, or otherwise dispose of the same contrary to law, and that he will pay all fines, costs, and damages that may be assessed against him for any violation of any of the provisions of the laws of this state relating to intoxicating liquors.

Laws of Nebraska, 1917 (Act of April 21, 1917), pp. 438, 439:

SEC. 32. If the existence of a nuisance be established in an action as provided in this act, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, bar fixtures, and movable property used in conducting the nuisance and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and shall direct that all intoxicating liquors and the receptacles in which said liquors are kept with unlawful intent shall be seized and held subject to the order of the court, and effectual closing of the building or place against its use for any purpose, and so keeping it closed a period of one year unless sooner released. * * *.

SEC. 34. If the owner appears and pays all costs of the proceedings and files a bond with sureties to be approved by the Clerk of the District Court in an amount to be ascertained by the court, or, in vacation, by the Judge or Clerk of the Court, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within a period of one year

thereafter, the court, or in vacation, the judge, may if satisfied of his good faith, order the premises closed under order of abatement to be delivered to said owner, and said order of abatement cancelled so far as the same may relate to said property; and if the proceeding be an action in equity and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to such building only. * * *.

North Dakota, Revised Codes, 1905, pp. 1532–1533:

SEC. 9373. * * * and if the existence of such nuisance is established, either in a criminal or equitable action, upon the judgment of a court or judge having jurisdiction, finding such place to be a nuisance, the sheriff, his deputy, or undersheriff or any constable of the proper county or marshal of any city where the same is located, shall be directed to shut up and abate such place, by taking possession thereof, * * * and said officer abating such nuisance shall securely close said building, erection, or place where such nuisance was located, as against the use or occupation of the same for saloon purposes, and keep the same securely closed for the period of one year, unless sooner released as hereinafter provided, * * * provided, however, that when leasehold premises are adjudged to be a nuisance, the owner thereof shall have the right to terminate the lease by giving three days' notice thereof, in writing, to the tenant, and when this is done the premises shall be turned over to the owner upon the order of the court or judge. But the release of the property shall be upon condition that the nuisance shall not be continued and

the return of the property shall not release any lien upon said property occasioned by any prosecution of the tenant. If the owner appears and pays all costs of the proceedings and files a bond with sureties to be approved by the clerk in the full value of the property to be ascertained by the court or judge, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within the period of one year thereafter, the court, or in vacation the judge may, if satisfied of his good faith, order the premises taken and closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property, and if the proceeding is an action in equity and bond is given and costs therein paid before judgment and order of abatement, the action shall be thereby abated; * * *.

Section 9373 was amended by Laws of North Dakota, 1915, pp. 292–293, to read:

* * * *Provided, however,* That when leasehold premises are *closed under a temporary injunctional order or have been* adjudged to be a nuisance, the owner thereof shall have the right to terminate the lease by giving three days' notice thereof, in writing, to the tenant, and when this is done, *if the said owner shall prove to the court that he was without fault, and neither knowingly, nor without knowledge negligently permitted the keeping or maintaining of the nuisance complained of,* the premises shall be turned over to the owner upon the order of the court or judge *as hereinafter set forth.* But the release of the property shall be upon the condition that the nuisance shall not be continued, and the return of the property shall

not release any lien upon said property occasioned by any prosecution of the tenant. If the owner appears and pays all costs of the proceedings and files a bond with sureties to be approved by the clerk in the full value of the property to be ascertained by the court or judge, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within the period of one year thereafter the court, or in vacation time the judge may, if satisfied of his good faith, order the premises taken and closed under the order of abatement, to be delivered to said owner; *and if the proceeding is an action either at law or in equity and bond is given and costs therein paid, the action shall be dismissed at the end of one year from the date of the service of the temporary injunctional order, if in an equity case, or the closing of the premises if in a criminal case; in the meantime and in either form of action the premises where such nuisance was kept and maintained, shall be regarded as being under a restraining order of the court, a violation of which will subject the violator to punishment for contempt as hereinafter provided;* * * *. (Italics indicate language added by this amendment.)

General Laws of Oregon, 1915 (Act of February 23, 1915), pp. 159, 160:

SEC. 16. The prosecuting officer of the county or any other prosecuting officer where the nuisance as herein defined exists, or is kept, or is maintained, shall maintain a suit in the circuit court of said country in the name of the State to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the suit and no bond shall be required, * * *.

SEC. 17. Upon its being shown to any court or judge thereof that any injunction granted by such court or judge under the provisions of this Act, is being violated, such court or judge may make an order commanding forthwith the enforcement of such injunction by such measures or means as in the judgment of the court or judge may be necessary to prevent further violation of such injunction.

SEC. 19. Any one who knowingly permits any building or tenement owned or leased by him or under his control, or any part thereof, to be used in maintaining a common nuisance as defined in this Act, or who, after being notified in writing by the prosecuting officer or officers or any citizen of such use, omits to take all proper measures, either to abate said nuisance, or failing therein to eject therefrom the person or persons so using the same, shall be deemed guilty of assisting in the maintaining of such nuisance.

Code of Laws of South Carolina, 1912, Vol. II, p. 432:

SEC. 819. * * * Under the arrest warrant the defendant shall be arrested and brought before such Magistrate, and the case shall be disposed of as in case of other crimes, except that when he commits or binds over the parties for trial to the next term of Court of General Sessions for the County he shall make out every paper in the case in duplicate and file one with the Clerk of the Court for the County and immediately transmit the other to the Solicitor of the Circuit, whereupon the said Solicitor shall at once apply to any Circuit Judge at chambers within that Circuit, or to the nearest Circuit Judge if there be none in that Circuit, for an order or injunction restraining the de-

fendants, their servants or agents, from keeping, receiving, bartering, selling, or giving away any alcoholic liquors until the further order of the Court, or perpetually after hearing after notice to the defendant. Such Circuit Judge is hereby authorized, empowered, and required to grant the said restraining order or injunction, without requiring a bond or undertaking upon the hearing or receipt by him of said papers from the Court of the said Magistrate by the hands of the Solicitor; and any violation of said restraining order or injunction shall be deemed a contempt of Court and punished as such by said Judge or Court, or any other Circuit Judge, as for the violation of an order of injunction. * * *

Session Laws of South Dakota. 1916–1917 (Act of February 21, 1917), pp. 527, 528–529:

SEC. 67. * * * Upon the trial of said action, if the court shall find in favor of the plaintiff that such nuisance existed or was kept or maintained at the time of the commencement of said action, a judgment shall be rendered declaring the existence of such nuisance and perpetually enjoining the defendants from ever using said premises or any part thereof for any such illegal traffic in intoxicating liquors and from ever maintaining or aiding in maintaining or committing such a nuisance at any place in the State, and ordering said premises, or that portion of said premises wherein such nuisance was maintained, to be closed and forbidding its use for any purpose for a year from the date of the rendition of such judgment, and that the intoxicating liquors found therein, and any furniture and fix-

tures used in conducting or maintaining such nuisance, to (be) publicly destroyed, * * *.

SEC. 69. If it appears at the trial in any action for an injunction that the owner of any real property or premises adjudged to be a nuisance and ordered abated and closed as such under the provision of this act did not know of, or had no reasonable ground for knowing, or could not have known by the exercise of reasonable diligence that such nuisance was being maintained on his said premises, and if he shall pay all costs of the proceedings, he may file a bond payable to the county wherein such property is situated, with sureties to be approved by the clerk, in such sum as the court may designate, the same to be not less than one-half the full value of the said property or portion of the property ordered closed, to be ascertained by the court or judge, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein during the period of his ownership, and the court or judge thereof may thereupon, if satisfied of his good faith, order the premises taken and closed under the said judgment, released from the order directing the same to be closed for a year from the date of said judgment and the possession thereof turned over to said owner. * * *.

Public Acts of Tennessee, 1913 (Act of October 17, 1913), pp. 667–668:

SEC. 6. *Be it further enacted,* That if upon the trial the existence of the nuisance be established an order of abatement shall be entered as part of the judgment or decree of the court, which order shall direct the removal from the building or place where such nuisance exists or is maintained, of all

means, appliances, fixtures, appurtenances, materials, supplies, and instrumentalities used for the purpose of conducting, maintaining, or carrying on the unlawful business, occupation, game, practice, or device constituting such nuisance; and shall direct the sale thereof, or such portion thereof as may be lawfully sold, upon such terms as the court may order, and the payment of the proceeds into court to be applied to costs or paid over to the owner, and the destruction of such portion thereof, if any, as can not be lawfully sold within this State; * * *.

Laws of Utah, 1917 (Act of February 8, 1917), pp. 8–9:

SEC. 11. Whenever a nuisance is kept, maintained, or exists, as defined in this Act, the same may be enjoined and abated by a suit in equity, as provided by Chapter 99, Laws of Utah, 1913, for the abatement of common nuisances; * * *.

Laws of Utah, 1913 (Act of March 24, 1913), p. 189:

SEC. 2. * * * Provided that when the owner or agent is not in the actual possession of the premises he shall have, before an action is brought against him or effecting his real estate, under this Act, notice in writing of the existance (existence) and nature of the nuisance, and he shall have a reasonable time after the service of said notice in which to abate said nuisance. * * *

Acts of Assembly, Virginia, 1918 (Act of March 19, 1918), p. 602:

SEC. 36. Injunctions against nuisances as defined in this act.—The commissioner, his deputies or inspectors, the attorney for the Commonwealth, or any citizen of the county,

town, or city where such a nuisance as is defined in this act exists or is kept or maintained, may, in addition to the remedies given in and punishment imposed by this act, maintain a suit in equity in the name of the State to abate and perpetually to enjoin the same. * * * Upon the hearing of the cause, when it shall have been matured and set for hearing as required by law, upon deposition of witnesses, documentary and oral evidence, if the court or judge in vacation shall be satisfied that the material allegations of the bill are true, although the premises complained of may not then be unlawfully used, it or he shall continue the injunction against such house, building, or place, if it shall be a drug store, for one year, and in all other cases the injunction shall be perpetual. * * *. (The Act makes no provision for closing the premises.)

Acts of West Virginia, 1913 (Act of February 17, 1913), p. 105:

SEC. 17. The commissioner, his agents and deputies, and the attorney general, prosecuting attorney, or any citizen of the county where such a nuisance as is defined in section fourteen of this act exists, or is kept or maintained, may maintain a suit in equity in the name of the state to abate and perpetually enjoin the same, and courts of equity shall have jurisdiction thereof. The injunction shall be granted at the commencement of the action and no bond shall be required.

It shall not be necessary for the court to find that the premises involved were being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the bill are true, the court shall order that no liquors shall be sold, bartered,

given away, distributed, dispensed, or stored in such house, building, boathouse, clubroom, or other place, nor in any part thereof, for a period of not to exceed one year in the discretion of the court from and after such finding, in case of a drug store; in other cases the order for abatement shall be perpetual. * * *.

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SUPREME COURT OF THE UNITED STATES.

No. 62.—October Term, 1927.

John A. Grosfield and Richard Caplis, *vs.* The United States of America.	On Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

[April 9, 1928.]

Mr. Justice Sutherland delivered the opinion of the Court.

This case came here from the court of appeals on certificate submitting certain questions upon which that court desired instruction. Upon an order requiring it, the entire record has been sent up for consideration. Judicial Code, § 239, as amended February 13, 1925, by c. 229, 43 Stat. 936, 938.

Suit was brought by the United States on March 11, 1925, in the federal district court for the Southern Division of the Eastern District of Michigan, against Grosfield and Caplis, owners, and Silverman, tenant, to enjoin the use of certain premises for the manufacture or sale of intoxicating liquor and to close such premises, as a common nuisance, for a period of one year. On March 30th, Grosfield and Caplis filed an answer, among other things denying that the premises were a common nuisance, and alleging that, as to whether intoxicating liquor was sold, kept or bartered upon the premises, they had no knowledge nor information sufficient to form a belief; that the first information they received that the premises were used for illegal purposes was contained in a newspaper account of a raid [made January 17, 1925] containing the information that various appliances for the manufacture of intoxicating liquor had been found and seized; that Silverman upon being spoken to declared that there would be no violations of law upon the premises, that everything of an unlawful nature had been taken out, and a lease of the premises was being negotiated for the storage of paper; that, thereafter, upon the receipt of a copy of the bill of complaint, steps were taken by defendants to terminate Silverman's tenancy; and that they will

proceed to oust him from the premises. On July 10, 1925, after a hearing, the bill was dismissed as to Silverman and a decree entered against Grosfield and Caplis in accordance with the prayer. No effort appears to have been made by those defendants to secure an order from the district court allowing them to give a bond so as to permit the continued occupation and use of the premises. The only question for our consideration is whether the evidence submitted to the district court is sufficient to justify the decree.

By § 21, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 314, any room, house, etc., where intoxicating liquor is manufactured, sold, kept, or bartered in violation of that title, is declared to be a common nuisance. By § 22, it is provided that an action to enjoin such nuisance may be brought in the name of the United States, to be tried as an action in equity; that it shall not be necessary for the court to find that the property involved was being unlawfully used at the time of the hearing, but if the material allegations of the petition are found to be true the court shall order that no liquor shall be manufactured, sold, etc., in such room, house, etc.; that upon judgment abating the nuisance the court may order that the premises shall not be occupied or used for one year thereafter, but may in its discretion permit them to be occupied or used upon the giving of a bond with sufficient surety in the sum of not less than $500 nor more than $1,000 conditioned that intoxicating liquor shall not thereafter be manufactured, sold, etc.

Evidence was introduced by the Government to the effect that on January 17, 1925, nearly two months before this suit was brought, police officers entered the premises involved (then in Silverman's possession) and there found and seized two 300-gallon copper stills in operation, two copper tanks and other appliances used for the purpose of manufacturing intoxicating liquor, 8,500 gallons of sugar mash, and 60 gallons of whiskey distillate. Grosfield, who was the only witness for the defendants, testified: "I rented these premises to Silverman for the purpose of storing hay and straw. I had no knowledge of any illegal use of the premises until this case. I have caused the tenancy of Silverman to be terminated and have rented the entire rear part of the building to the Boston Paper Company for the storage of paper." Being asked by the court: "You did not remove this tenant before the institution of these proceedings?" he answered: "I had no knowledge that the

premises were used in this way until these proceedings were started."

Considering the evidence in connection with the sworn answer of the defendants, we cannot say that the decree is without adequate support. The purpose of the provision of the statute authorizing an injunction against occupancy and use is not punitive but preventive, *Murphy* v. *United States,* 272 U. S. 630, 632; and it is no answer to the suit to say that the owner did not participate in the criminal act of the tenant. That the tenant may have been ousted and the illegal use of the premises ended before the decree is not conclusive, if the evidence furnish reasonable ground for apprehending a repetition of such use. *United States* v. *Pepe,* 12 F. (2d) 985, 986; *Schlieder* v. *United States,* 11 F. (2d) 345, 347; *United States* v. *Boynton,* 297 Fed. 261, 267-268; *Grossman* v. *United States,* 280 Fed. 683, 685-686. The evidence discloses that the illegal use of the premises was discovered nearly two months prior to the bringing of this suit, with full knowledge of which discovery defendants fairly may be charged, having read a newspaper account of the raid and talked with Silverman about it. When the answer was filed, although two and one-half months had elapsed, Silverman was still in possession, and the answer contains the averment only that steps had been taken to terminate his tenancy and a promise that defendants would proceed to oust him. The tenancy was from month to month. The circumstances called for prompt action; and the failure of the owners of the premises to take any steps to remove the offending tenant until after the suit had been brought against them evinces a lack of concern not easily reconcilable with a real desire upon their part to make sure that the evil use of their property would not be repeated. Grosfield's statement—made in response to the interrogative suggestion of the court that the tenant was not removed before the institution of these proceedings—that he had no knowledge that the premises were being improperly used until the proceedings were begun, is inconsistent with the averment in the answer that he had read the newspaper account in respect of the unlawful use of the premises disclosed by the raid of January 17th.

That defendants, long before the suit against them was begun, knew of the tenant's violation of law, is not open to reasonable dispute; and their delay until after suit to take steps to get rid of him, in the face of his criminal use of the premises, well might be attributed to a lack of good faith on their part. Nor is it un-

fair to say that their failure to act until complaint was served upon them, evidences a surrender to the unavoidable rather than a voluntary effort to prevent a renewal of the nuisance. The trial judge who saw Grosfield and heard his testimony was better able to pass upon his credibility and trustworthiness than are we.

Upon consideration of all the circumstances, we find no ground for disturbing the conclusion upon which the decree must rest, namely, that the premises ought to be closed for a period long enough to end the probability of a recurrence of their unlawful use. We are the more content with this conclusion, since it is still within the power of the district court to permit the premises to be occupied or used upon the giving of a bond with sufficient surety in the amount and upon the conditions prescribed by the statute. See *United States* v. *Pepe, supra*; *Schlieder* v. *United States, supra*, p. 347.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.